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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

J.P. MORGAN CHASE & CO., *et al.*,

Petitioners,

v.

THE RETIREMENT SYSTEMS OF ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAY B. KASNER
Counsel of Record
JOHN L. GARDINER
CYRUS AMIR-MOKRI
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Counsel for Petitioners

182996

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED FOR REVIEW

Whether the bar imposed by 28 U.S.C. §§ 1334(d) and 1452(b) on this Court's review of orders to abstain and remand, or not to abstain, in actions removed from state court on the ground that they fall within federal bankruptcy jurisdiction violates the Exceptions Clause of Article III of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners:

J.P. Morgan Chase & Co.; J.P. Morgan Securities, Inc.; Citigroup Inc.; Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.); Bank of America Corporation; and Banc of America Securities LLC.

Respondents:

The Retirement Systems of Alabama, consisting of: The Employees Retirement System of Alabama; The Teachers Retirement System of Alabama; The Public Education Employees' Health Insurance Fund; The Public Employees Individual Retirement Account Fund; The Clerks' And Registers' Supernumerary Fund; The Wildlife And Freshwater Fisheries Fund; The Alabama Cultural Resources Preservation Trust Fund; and The Alabama Trust Fund.

The following party was also an appellant in the Eleventh Circuit, but is not a petitioner in this petition, and is being served as respondent herein:

Bernard J. Ebbers

RULE 29.6 STATEMENT

Petitioner J.P. Morgan Chase & Co., a publicly held company, is the parent of Petitioner J.P Morgan Securities, Inc. No other publicly held company owns 10% or more of the stock of Petitioner J.P. Morgan Securities, Inc.

Petitioner J.P. Morgan Chase & Co. has no parent and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Inc., a publicly held company, is the parent of Petitioner Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.). No other publicly held company owns 10% or more of the stock of Petitioner Citigroup Global Markets Inc.

Petitioner Citigroup Inc. has no parent and no publicly held company owns 10% or more of its stock.

Petitioner Bank of America Corporation, a publicly held company, is the parent of Petitioner Banc of America Securities LLC. No other publicly held company owns 10% or more of the stock of Petitioner Banc of America Securities LLC.

Petitioner Bank of America Corporation has no parent and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit dismissing the appeal for lack of jurisdiction, *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, No. 02-15385 (11th Cir. June 18, 2003), is set forth in Appendix A beginning on page 1a.

The opinion and order of the United States District Court for the Middle District of Alabama denying Defendants-Petitioners' motion to stay and granting Plaintiffs-Respondents' motion to remand, *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, No. CV-02-A-898-N (M.D. Ala. Sept. 24, 2002), is reported at 285 B.R. 519 and is set forth in Appendix B beginning on page 4a.

JURISDICTION IN THIS COURT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the Eleventh Circuit's order dismissing the appeal for want of appellate jurisdiction, which order was entered June 18, 2003.

Pursuant to 28 U.S.C. § 2403(a), this petition shall be served on the Solicitor General of the United States in accordance with Supreme Court Rule 29.4(b). Pursuant to 28 U.S.C. § 2403(b), the United States Court of Appeals for the Eleventh Circuit certified to the Attorney General the fact that the constitutionality of an Act of Congress had been drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions involved are: U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1334; and 28 U.S.C. § 1452. These provisions are set forth in Appendix C beginning at page 30a.

STATEMENT OF THE CASE

Background

Petitioners respectfully request that this Court examine the constitutionality of a statute that absolutely forbids it from reviewing a class of decisions by district courts, including decisions regarding the propriety *vel non* of comity-based abstention from the exercise of federal bankruptcy jurisdiction and remand.[1] The federal district courts have been issuing contrary rulings on this subject, even in the face of cases presenting identical circumstances. The statutes in question here leave no mechanism for correcting legal error in these decisions. The resulting uncertainty in the law impairs the development of legal doctrine, undermines confidence, and, as in the instant case, hampers the rational administration of multidistrict litigation.

In June 2002, WorldCom, Inc. ("WorldCom") announced that it intended to restate its historical financial statements because, among other things, it had improperly treated more than $3.8 billion in ordinary costs as capital expenditures. Numerous private securities actions were filed in the wake of this and subsequent announcements by WorldCom concerning its financial state. Though many actions have been brought by alleged purchasers of WorldCom stock, a large number, including the action underlying this petition, have been commenced by individual plaintiffs who have based their actions on allegations concerning WorldCom debt ("Bondholder Actions"). (A list of Bondholder Actions commenced to date is set forth in Appendix D beginning on page 33a.) By and large, the latter group of plaintiffs, among other things, claim purchases of debt securities in two offerings, in May 2000 and May 2001, as a result of which WorldCom issued over $ 15 billion worth of securities.

1. The Petitioners' submission of this petition is not intended to waive any objections they may have to assertion of personal jurisdiction by the district court or state court. *See, e.g., Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929).

To date, sophisticated institutional investors have commenced more than four dozen Bondholder Actions in state courts scattered across the country. Though displaying a preference for state court, almost all Bondholder Actions, this action included, seek relief under the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77a, *et seq.*; indeed, most such actions set forth claims *solely* under the Securities Act. This litigation strategy is carefully calibrated. The Securities Act allows for concurrent jurisdiction and has a general anti-removal provision that bars ordinary federal question removal. *See* 15 U.S.C. § 77v(a). These circumstances have led the transferee court designated by the Judicial Panel on Multidistrict Litigation ("JPML") to oversee the sprawling WorldCom litigation to observe that, by asserting federal claims only under the Securities Act, the institutional investor plaintiffs aim to avoid litigation in federal court and to ensure that the actions proceed in the multiple state jurisdictions in which they have been commenced. *See In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 315-16 (S.D.N.Y. 2003).

Though the Bondholder Actions have been filed in multiple state court jurisdictions, the complaints are substantially similar – in many cases, aside from the identities of the plaintiffs, they are more or less identical. The named defendants by and large consist of past and present WorldCom officers and directors, Arthur Andersen LLP ("Andersen"), WorldCom's former auditor, and others such as the Petitioner bank holding companies and investment banks. The allegations are that (i) WorldCom's financial statements were materially false and misleading; (ii) Andersen improperly certified the financial statements, which were incorporated into various public statements, including registration statements and prospectuses issued in connection with certain WorldCom debt offerings; (iii) the debt securities were issued under or are traceable to the aforementioned literature; and (iv) at the time of the debt offerings, Petitioners and others knew or should have known that the financial statements were materially false and misleading.

The substantial overlap in the subject matter of the litigation spawned by WorldCom's disclosures prompted parties to file motions with the JPML seeking centralization. The first motions were filed in July 2002. The JPML scheduled argument on this subject for its September 26, 2002 sitting.

On July 21, 2002, WorldCom filed a voluntary petition for bankruptcy relief in the Southern District of New York. An automatic stay of all securities litigation against WorldCom ensued. *See In re WorldCom*, 293 B.R. at 313. With WorldCom in bankruptcy, Petitioners (among others) removed the dozens of Bondholder Actions under the authority of 28 U.S.C. § 1452(a) and notified the JPML of the existence of these "tag along" actions. *See* J.P.M.L. R. 7.4. The grounds for removal were that the actions are "related to" the WorldCom bankruptcy by virtue of, among other things, contractual indemnification and statutory contribution rights that Petitioners and others have as against WorldCom. The underwriting agreements entered into in connection with the debt offerings at issue provide for reimbursement by WorldCom both for current costs and expenses incurred in connection with defending the Bondholder Actions and for any ultimate liability. As the removals were being effectuated, Petitioners also moved the district courts for stays pending a decision by the JPML on the transfer of each removed action.

On October 8, 2002, the JPML ordered the WorldCom cases transferred to the Honorable Denise Cote of the United States District Court for the Southern District of New York. *See In re WorldCom*, 293 B.R. at 312. Ever since the JPML's October 8 ruling, numerous Bondholder Actions – both those pending at the time of the JPML's ruling and actions commenced in the months thereafter – have been transferred to Judge Cote, with most transferor district courts entering stays and, thereby, allowing the multidistrict litigation process

to take its course. *See*, *e.g.*, *id.* at 313-14. Thus far, in no case where the JPML actually has had occasion to rule on the propriety of a final transfer of a Bondholder Action has it declined the invitation to transfer.

Even so, plaintiffs in virtually every Bondholder Action have filed remand motions in the potential transferor courts. As may be expected given the circumstances of the WorldCom litigation, these motions are virtually identical. Accordingly, in their motions for a stay, Petitioners and other defendants have submitted that a stay by the transferor court pending transfer by the JPML is necessary in part because of the importance of avoiding potentially inconsistent decisions on identical jurisdictional questions in this multidistrict litigation.

But consistency has not been achieved because some potential transferor courts have decided not to stay their hand. On September 24, 2002, two days before the JPML's scheduled hearing on the WorldCom matters, the district court below became the first court to reach the merits of a remand motion in a Bondholder Action. Declining definitively to rule on whether federal "related to" bankruptcy jurisdiction was proper, the district court elected to abstain from its exercise.

On March 3, 2003, Judge Cote, to whom the JPML had transferred the cases, issued an Opinion and Order denying an omnibus motion brought by plaintiffs in one Bondholder Action – joined by over forty other plaintiffs from multiple other Bondholder Actions – to remand their actions to state court. Judge Cote held that federal jurisdiction was proper because, at the very least, defendants' statutory contribution rights satisfied the "conceivable effect" test, *see Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), *overruled on other grounds*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), for establishing "related to" bankruptcy

jurisdiction. *See In re WorldCom*, 293 B.R. at 319, 321. Judge Cote then held that abstention from assertion of federal jurisdiction was unwarranted, particularly because plaintiffs had set forth federal securities laws claims. *Id.* at 333-34.

Thus, district courts have reached diametrically opposed conclusions on the very same question of whether it is appropriate to exercise federal jurisdiction relating to the WorldCom bankruptcy. Moreover, and particularly since Judge Cote's order, an increasing number of Bondholder Actions have been filed, and plaintiffs in these actions, relying heavily on the lower court's ruling, urge the potential transferor district courts to dissent from Judge Cote's decision. Some transferor courts have expressly declined such invitations, either by staying the actions pending transfer or, following Judge Cote, by actually issuing rulings denying the motions to remand. But not all courts have followed this course. To date, two district courts have emulated the district court below in holding that abstention is proper.[2] Two other district courts have remanded on grounds of lack of subject matter jurisdiction or improper removal.

Proceedings in the District Court

Respondents originally commenced this action in Alabama state court based upon their alleged purchase of WorldCom debt securities in WorldCom's May 2000 and May 2001 offerings. Their complaint, as amended, asserts claims

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2. *Compare Carpenters Pension Trust for S. Cal. v. Ebbers*, No. CV 03-04878 CBM (MCX), 2003 WL 22098022, at *2-*4 (C.D. Cal. Sept. 9, 2003) (declining to abstain and remand on equitable grounds); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, No. SA CV 03-813 GLT (ANX), 2003 WL 22025158, at *2 (C.D. Cal. June 30, 2003) (same), *with Ill. Mun. Ret. Fund v. Citigroup, Inc.*, Civ. No. 03-465-GPM, slip. op. at 5 (S.D. Ill. Sept. 9, 2003) (abstaining and remanding); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, slip. op. at 6-7 (M.D. Tenn. May 9, 2003) (similar).

against Petitioners and others under Sections 11, 12 and 15 of the Securities Act, 15 U.S.C. §§ 77k, 77l, 77o, and under Alabama state securities and common law. Petitioners timely removed the action to the United States District Court for the Middle District of Alabama under 28 U.S.C. § 1452(a) on the ground that federal subject matter jurisdiction is premised upon "related to" bankruptcy jurisdiction. *See* 28 U.S.C. § 1334(b).

On August 9, 2002, Respondents moved to remand or abstain, relying largely on *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002), a case arising out of the financial demise of Enron Corporation, in which Respondents also were plaintiffs and also had asserted Securities Act claims. The *Merrill Lynch* decision was authored by the Honorable W. Harold Albritton, the district court to whom the instant case was assigned.

On August 13, Petitioners moved the district court for a stay pending the JPML's decision whether to transfer this and other Bondholder Actions to a multidistrict litigation transferee court. Petitioners cited to precedent such as *Gould v. National Life Insurance Co.*, 990 F. Supp. 1354 (M.D. Ala. 1998) (Albritton, C.J.), in which the district court previously had endorsed the principle that it is preferable for transferor courts to refrain from ruling on common questions, including questions of federal subject matter jurisdiction, when a potential transfer would permit a transferee court efficiently to decide the issue. *See id.* at 1358, 1363. Petitioners noted that, because all plaintiffs in the several removed Bondholder actions were moving for remand on virtually identical grounds, the risk of inconsistent decisions favored a brief stay.

Also on that day, the district court instructed Petitioners and the other defendants to "show cause why this case should not be remanded" for the reasons set forth in *Merrill Lynch*. Petitioners, as they had in their stay motion, stressed the need for a JPML transferee court to decide common issues,

including whether "related to" bankruptcy jurisdiction exists and whether the assertion of federal jurisdiction otherwise would be appropriate. More specifically with respect to the question of abstention, Petitioners argued that, given that "related to" jurisdiction properly could be asserted, the district court had a presumptive duty to exercise federal jurisdiction. Petitioners also submitted that there were no special circumstances counseling in favor of abstention.

On September 24, 2002, the district court issued an order abstaining from the exercise of federal jurisdiction and remanding the case. The stated grounds for abstention tracked those set forth in *Merrill Lynch*, a summary of which follows.

The plaintiffs in the *Merrill Lynch* action originally had been non-representative plaintiffs in a putative class action pending in the Eastern District of Texas before the Honorable Melinda Harmon, to whom the JPML had transferred Enron-related litigation. *Merrill Lynch*, 209 F. Supp.2d at 1260. Plaintiffs had moved the JPML to grant it status as an "advisory plaintiff," which motion was denied. At that point, with the actions still pending before Judge Harmon, the plaintiff opted out of the putative class and commenced the *Merrill Lynch* action in Alabama state court. Defendants removed the action under 28 U.S.C. § 1452(a). 209 F. Supp.2d at 1260.

On a motion to remand, the *Merrill Lynch* court concluded that it was uncertain as to whether federal subject matter jurisdiction existed. *Id.* at 1267, 1269. It nevertheless abstained for reasons of comity under the permissive abstention provision of 28 U.S.C. § 1334(c)(1), and remanded the action. *Id.* at 1269-70. The court offered five principal reasons for its comity-based abstention: (i) questions of state law predominated and there was no basis for federal jurisdiction other than bankruptcy; (ii) there were no "*per se*" bankruptcy

issues; (iii) the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 77p(d)(2)(a), "evince[s] a policy of special respect for the forum choices of state pension plans with regard to securities claims and for state courts whose jurisdiction is invoked to hear them"; (iv) potential deprivation of the right to trial by jury if transfer were made to bankruptcy court; and (v) the court's own uncertainty as to the procedural propriety of removal and as to the existence of federal subject matter jurisdiction. 209 F. Supp. at 1268-69.

The *Merrill Lynch* case is significant not just because it drove the ruling below, but also because it demonstrates that the problem to which this petition speaks is recurring in nature. The WorldCom litigation has not been the only circumstance in which a decision of the lower court here on the question of abstaining from federal bankruptcy jurisdiction has come into conflict with a ruling of a JPML-designated transferee court. Judge Harmon, faced with issues in a removed action similar to those presented in *Merrill Lynch*, held both that the action was "related to" the Enron bankruptcy and that abstention from the exercise of federal bankruptcy jurisdiction was not warranted. *See In re Enron Corp. Sec. Derivative & ERISA Litig.*, Nos. MDL-1446, Civ. A. H-01-3624, Civ. A. G-02-0299, 2002 WL 32107216 (S.D. Tex. Aug. 12, 2002).[3]

Proceedings Before the Court of Appeals

Petitioners timely filed their notices of appeal to the United States Court of Appeals for the Eleventh Circuit. On October 6, 2002, Respondents moved to dismiss the

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3. For a discussion of the recurring nature of the underlying issues, *see* Jeffrey W. Kilduff, Elizabeth H. Baird & Robert M. Stern, *Commentary: Bondholders' State Securities Suits Pose New Threat to Wall Street*, 9 No. 5 Andrews Sec. Litig. & Reg. Rep. 18 (July 30, 2003).

appeal on the assertion that it was barred by the jurisdiction-stripping provisions of 28 U.S.C. §§ 1334(d) and 1452(b). On October 16, 2002, Petitioners timely filed an opposition, in which they first indicated that they intended to challenge the constitutionality of these statutory provisions purporting to strip appellate jurisdiction. Petitioners submitted that because these statutes forbid *all* review by this Court of decisions to abstain and remand, or not to abstain, when removal is based on 28 U.S.C. § 1452(a), these provisions violate the Exceptions Clause of Article III of the United States Constitution.

On October 23, 2002, the Eleventh Circuit instructed the parties to address the question whether the district court's order of abstention and remand was reviewable. Petitioners timely submitted their response and also filed a notice pursuant to 28 U.S.C. § 2403(a) and Federal Rule of Appellate Procedure 44 indicating that the constitutionality of an Act of Congress was being drawn into question. The Eleventh Circuit duly certified that fact to the Attorney General of the United States. The Eleventh Circuit instructed the parties to fully brief the appeal on the merits and thus ordered that Respondents' motion to dismiss the appeal would be carried with the case. The United States intervened to defend the constitutionality of the statutes.

On June 18, 2003, the Eleventh Circuit issued an order dismissing the appeal. The court of appeals held that appellate jurisdiction existed to review the challenge to the statutes' validity under the Constitution. On the merits of the constitutional question, the court of appeals stated: "Having carefully reviewed the briefs submitted by Plaintiff, the Defendants, and the United States, we conclude that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional." *Retirement Sys. of Ala. v. J.P. Morgan Chase*, No. 02-15385, slip op, at 3 (11th Cir.

June 18, 2003) (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1869)). The court of appeals offered no further analysis or explanation.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for consideration of an important question, fundamental to the relations between this Court and the Congress, concerning the scope of Congress's authority to make exceptions and regulations to this Court's appellate jurisdiction. It cannot be gainsaid that Congress lacks plenary power to make exceptions to this Court's appellate jurisdiction; the existence of such power could imperil the institutional integrity of the federal judiciary. At the same time, this Court has recognized that Congress may remove from this Court's appellate jurisdiction certain "classes of cases." The statutes here at issue purport to forbid this Court from reviewing comity-based orders to abstain and remand, or not to abstain, from the exercise of federal bankruptcy jurisdiction in cases that have been removed pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). These statutes thus rely on legal content to define the "class" of orders excepted from this Court's appellate jurisdiction. This petition raises the important question whether Congress may withdraw *completely* from this Court the ability to review a class of cases – together with the specific legal questions that they routinely encompass – by defining "class" in terms of its legal content.

Petitioners respectfully submit that Congress does not enjoy such authority. This conclusion is compelled by the text, structure and drafting history of Article III, together with fundamental considerations underlying the constitutional plan, wherein this Court was established to fulfill the essential function of serving as the guarantor of uniformity in the

interpretation of federal law. Exceptions drawn in terms of legal content imperil this essential function.

Although this Court has not had occasion to speak to the question raised by this petition, a recent statement concerning the scope of the Exceptions Clause supports the conclusion that foreclosure of *all* possibility of review of classes of cases, or orders, defined in terms of legal subject matter could violate Article III, § 2. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) (stating that an Exceptions Clause violation was not indicated where the statute "[did] not repeal [this Court's] authority to entertain a petition for habeas corpus"). Such an understanding of the Exceptions Clause comports also with certain of this Court's earlier statements on the subject. For example, this Court has noted its general approval of Congress's exercise of the exceptions power where either (i) all avenues for review of the particular legal issue(s) had not been foreclosed or (ii) Congress had crafted the exception in terms that essentially were neutral with respect to legal content. Examples of "law neutral" means of crafting exceptions include relying on amounts in controversy, ordinarily a question of fact, as the basis for determining whether a case qualifies for this Court's appellate jurisdiction. Defined in this manner, exceptions do not compromise this Court's function as guarantor of uniformity of federal law because, although the possibility of review of particular questions of federal law may not be available in *some* cases, the opportunity for reviewing those questions of law is not foreclosed in *every* case.

Practical effects further highlight the significance of the question presented by this petition. Statutes that completely curtail this Court's power to review particular questions of federal law would tend to proliferate and perpetuate doctrinal confusion and discordant rulings in the inferior courts. This concern has become a reality with the statutes at issue in this petition.

For instance, the allowance by 28 U.S.C. § 1334(c)(1) for a district court to "abstain" on grounds of "comity" refers to well-established judicially-created concepts. In this case, however, the district court's abstention analysis is materially at variance with settled doctrine. A factor that drove the lower court's decision to abstain was its supposition that comity was implicated by the general provision in the Securities Act that permits "State pension plans" to file actions either in federal or in state court, even though recent legislation has made certain class actions removable. But Congress's grant of concurrent jurisdiction for asserting federal causes of action has never been held by this Court to be a permissible ground for abstention. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-14 (1976) ("'It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.'") (quoting *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter J. concurring)).

Thus, the disharmony in the outcomes of particular cases results not from discretion applied to variant circumstances, but from the lower courts' divergent views of the law informing their exercise of discretion. Doctrinal confusion, in turn, engenders the inconsistent application of law. Although there was no material difference in the arguments or factual circumstances presented to Judge Cote and Chief Judge Albritton on the question of abstention from federal jurisdiction, they nevertheless reached opposite conclusions because of fundamentally different views concerning what factors, as a matter of law, countenance abstention. Differing interpretations and applications of the law are a commonplace in the inferior federal courts. But what sets these circumstances apart from the norm is that there is no prospect for eventual correction or uniformity. The Constitution created this Court so that discord of this nature could be alleviated.

In addition to the significant institutional concerns stated above, the need for this Court's review here is indicated further by the importance of the subject matter that purportedly is foreclosed from this Court's appellate jurisdiction. The jurisprudence of abstention, established in significant rulings of this Court, finds its pedigree in important constitutional concerns underlying federalism. The doctrine assures the proper balancing of adjudicative authority between state and federal courts when matters concerning the states' sovereign prerogatives are implicated.

Being ultimately an exercise of a federal *court*'s informed discretion, it is imperative that authoritative pronouncements on this doctrine be made by the ultimate arbiter in the federal judiciary. The obvious significance of the abstention questions, particularly in light of the strong federal bankruptcy interest, in the past has occasioned the grant of certiorari by this Court to consider the propriety *vel non* of abstention in the context of bankruptcy-related litigation. *See Mangus v. Miller*, 317 U.S. 178 (1942); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). Because such cases already have been deemed sufficiently important to command this Court's attention, this Court should assess the constitutionality of statutes that now forbid that review.

ARGUMENT

I. The Jurisdiction-Stripping Provisions of 28 U.S.C. §§ 1334(d) and 1452(b) Violate Article III Because They Define the Class of Cases Excepted From This Court's Appellate Jurisdiction in Terms of Legal Content and Forbid All Access to Review by This Court

In pertinent part, 28 U.S.C. § 1334(d) provides that "[a]ny decision to abstain or not to abstain" made in a case over which there is bankruptcy jurisdiction "is not reviewable

by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title." The jurisdiction-stripping language of section 1452(b), which concerns the specific context of bankruptcy removal, is the same. *See* 28 U.S.C. § 1452(b). The plain import of these statutes confirms that they foreclose *any* review by this Court of a class of decisions by inferior Article III courts, which encompass the comity-based abstention and remand order issued in this case.

The statutes thus feature two attributes, which, in combination, render these jurisdiction-stripping provisions highly unusual. First, the bar to this Court's review is complete. Review by way of 28 U.S.C. § 1257 is not possible because remand orders, being orders entered by a federal court, are not subject to review from the final decision of a state court of last resort. Consequently, the statute's foreclosure of appeals by way of this Court's certiorari jurisdiction, *see* 28 U.S.C. § 1254, blocks all avenues of redress in this tribunal.

Second, the statutes define the class of orders they affect in terms of their legal content. As a result, the inferior Article III courts' pronouncements on legal questions typical of this class of decisions – specifically including the comity-based abstention from exercising federal bankruptcy jurisdiction in this case – have become shielded from this Court's scrutiny. When Congress thus fashions exceptions to this Court's appellate jurisdiction, it transgresses its authority.

In cases implicating the meaning of Article III, this Court has expressed vigilance against the danger that a "provision of law 'impermissibly threaten[] the institutional integrity of the Judicial Branch.'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). To determine

the constitutionality of a provision affecting the scope of power enumerated under Article III, reference is made to the "purposes underlying the requirements of Article III," which "inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application'" of that article. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-48 (1986) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985)). Examination of the purposes that compelled the creation of this Court indicates that the statutes here impermissibly threaten the institutional integrity of the Judicial Branch.

The Framers established a *unitary* Supreme Court to serve as ultimate arbiter over differences of opinion on questions of federal law. *See* The Federalist No. 81, at 450 (Alexander Hamilton) (Isaac Kramniek ed., 1987) (observing that the fact "[t]hat there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be, contested"); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (describing hierarchical character of the federal judiciary as described in Article III, under which "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole"). A court possessed of "a general superintendance" and "authorised to settle and declare in the last resort, an uniform rule of civil justice" was deemed necessary "[t]o avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories." The Federalist No. 22, at 182 (Alexander Hamilton).

This Court approvingly has echoed the Framers' purpose on several occasions. For example, it stated through Justice Story that:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a

> treaty of the United States, or even the Constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816); *see also Ableman v. Booth*, 62 U.S. (21 How.) 506, 518 (1858) (stating that it is essential to the very existence of the government of the United States "that a tribunal should be established" that would "finally and conclusively" decide all federal questions so that "uniformity of judicial decision[s]" and federal supremacy may be maintained); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (Marshall, C.J.) (similar).

The hierarchical setting of the Judicial Branch is essential to its proper function. Distortions of that structure, even if seemingly concerned only with trifling matters, constitute an impermissible encroachment into the province of the judiciary. *Cf. Morrison v. Olson*, 487 U.S. 654, 709-10 (1988) (Scalia, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (observing that the "accretion of dangerous power" results from "the generative force of unchecked disregard of the restrictions that fence in even the most

disinterested assertion of authority"). The statutes here distort the structure that Article III envisions. This Court cannot successfully perform its essential functions of guaranteeing the uniformity of federal law if Congress excepts from its appellate jurisdiction classes of cases or orders issued by inferior Article III courts defined in terms of their particular legal content. An expansive understanding of the exceptions power, a noted scholar has observed, would authorize "exceptions which engulf the rule" and result in "reading the Constitution as authorizing its own destruction." *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953); *see also* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 168-69 (1960).

Although the particular question posed in this petition has never been squarely addressed in this Court's decisions, and although this Court's pronouncements on the general subject sometimes are difficult to reconcile, precedent supports the conclusion that Congress cannot foreclose this Court's ability to review classes of federal cases or orders issued by Article III courts based on their legal content. For example, in *Felker v. Turpin*, 518 U.S. 651 (1996), this Court, through the Chief Justice, stated that, although the Antiterrorism and Effective Death Penalty Act of 1996 had foreclosed certain avenues of this Court's review of habeas corpus petitions, because "it [did] not repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." 518 U.S. at 661-62. Thus, this Court suggested that, if its authority to entertain such a petition had been curtailed, there could be a claim that the Exceptions Clause had been violated. The concurring opinion of Justice Souter emphasized this very point. *See id.* at 667 (Souter, J., with whom Stevens and Breyer, JJ., joined, concurring) (noting that, had the legislation foreclosed all manner of review, "the question

whether the statute exceeded Congress's Exceptions Clause power would be open").

The statements in *Felker* recall a suggestion made over a century before in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). The question was whether Congress had the power to except from this Court's appellate jurisdiction appeals pending from circuit courts in habeas corpus actions. Congress had authorized this particular means of bringing habeas corpus cases to this Court's attention by legislation enacted only a year before. This Court upheld the constitutionality of the jurisdiction-stripping statute. Significantly, however, it added:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

Id. at 515. This last statement implied that Congress had not overstepped its exceptions power because all avenues by which habeas corpus petitions could be presented to this Court had not been foreclosed.

The following year, this Court addressed the observation that concluded its decision in *Ex parte McCardle*, namely, whether the jurisdiction-stripping provisions of the legislation at issue in that case precluded this Court from issuing a writ of habeas corpus under the Judiciary Act of 1789. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869). Holding that it did not, *see id.* at 104-06, this Court confirmed its observation in *Ex parte McCardle* that the enactment of 1868 did not "affect the jurisdiction which was previously exercised." Given that

the power to review habeas corpus petitions was considered to fall within this Court's *appellate* jurisdiction, *see Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807), the enactment at issue in *Ex parte McCardle* did not qualify as an exception to the entirety of this Court's appellate jurisdiction to review habeas corpus petitions. Significantly, in support of its holding, this Court explained:

> [I]t is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

Ex parte Yerger, 75 U.S. (8 Wall.) at 102-03. Although the context is different, these same basic principles apply here, as well.

In light of this precedent, the reliance by the court of appeals below on *Ex parte McCardle* and *Ex parte Yerger* to uphold the subject statutes cannot be sustained. Indeed, the Eleventh Circuit's predecessor once recognized that the circumstances of those cases did not involve foreclosure of all avenues of appeal. *See King v. Finch*, 428 F.2d 709, 712 n.4 (5th Cir. 1970) (noting that "the Act at issue in *McCardle*

foreclosed only one avenue of approach to the Supreme Court").

That Congress may not foreclose all avenues of appeal to this Court in certain classes of cases is not to say that Congress's exceptions authority is non-existent. Congress has excepted "classes of cases" from this Court's review with this Court's blessing. In these cases, however, it does not appear that this Court ever specifically has held that foreclosure of review based on legal content is a valid exercise of Congress's exceptions power.

Generally, it appears that this Court has sanctioned Congress's exercise of the full extent of the exceptions power only where the "classes of cases" either (i) were drawn in terms neutral with respect to legal content or (ii) involved exceptions as to reviewing issues of fact. Such exceptions ordinarily cannot be said to violate Article III because they do not compromise this Court's ability to exercise its essential functions of maintaining the uniformity of federal law.

An early example of such a pronouncement appears in *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), where this Court indicated that Congress permissibly could preclude writs of error from reaching this Court in cases presented with matters in controversy less than $2,000. *See id.* at 314. Defining exceptions in terms of amounts-in-controversy represents an attempt to define a "class" of cases in terms of a factual determination, not its legal content. Ordinarily, then, such line-drawing ought not, at least on its face, indicate a problem under the Exceptions Clause.

Other decisions have upheld restrictions in this Court's ability to review findings of fact. The question in *The 'Francis Wright'*, 105 U.S. 381 (1881), for example, was whether Congress properly could limit this Court's review of

admiralty cases to questions of law arising on the record. *See id.* at 384; *see also Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 537-40 (1926) (addressing similar issue and relying on analysis of *The 'Francis Wright'*). This Court responded in the affirmative. *See The 'Francis Wright'*, 105 U.S. at 385-86. Again, on its facts, *The 'Francis Wright'* would not present an Exceptions Clause problem; the exception at issue there preserved this Court's essential function of being the ultimate expositor on questions of federal law. Restrictions on reviewing questions of fact comport with this Court's role as an appellate tribunal, the principal purpose of which is to focus on correcting errors of law.

To be sure, this Court's precedent sometimes contains sweeping language concerning the scope of Congress's exceptions power. For instance, in *The 'Francis Wright'*, this Court noted that, under the exceptions power, "[n]ot only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review while others are not." 105 U.S. at 386. But "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens*, 19 U.S. (6 Wheat.) at 399; *see also Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) (cautioning that, "[p]articularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). The expansive declaration in *The 'Francis Wright'* was immediately tempered by a statement of the specific holding in the case: "To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in

cases where the value of the matter in dispute is less than $5000." 105 U.S. at 386. Particularly in light of the implications of recognizing an expansive exceptions power, cases such as *The 'Francis Wright'* cannot be construed to hold that *any* classes of cases or orders, howsoever defined, permissibly may be shielded from this Court's appellate scrutiny.

Both 28 U.S.C. § 1334(d) and § 1452(b) plainly purport to make exceptions on the basis of legal content. Although the constitutional plan, consistent with this Court's precedent, indicates that Congress's power does not extend so far as to permit the exceptions identified in these statutes, this Court has never squarely addressed the problem posed in this petition. Moreover, this Court's holdings and statements on the general subject are not entirely consistent. Therefore, this Court should grant certiorari to review the constitutional validity of these statutes and to clarify Congress's power in this regard.

II. The Statutes Foreclose Review of Significant Legal Issues Which Previously Have Justified This Court's Assertion of Its Certiorari Jurisdiction

One manner of gauging the practical significance of the question posed is to consider the types of cases that are foreclosed from this Court's review. The cases affected implicate significant questions concerning the exercise of federal jurisdiction.

One of the subjects encompassed by the sweep of 28 U.S.C. §§ 1334(d) and 1452(b), and the subject matter pertinent to this case, is comity-based abstention from the exercise of federal jurisdiction and remand to state court. Specifically, 28 U.S.C. § 1334(c) permits district courts to abstain from exercising jurisdiction over cases "arising

under," "arising in," or "related to" bankruptcy jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law." Section 1452(b) incorporates these concepts by permitting district courts to remand on "any equitable ground."

When an Act of Congress borrows terms with established meanings from existing doctrine, it is presumed that those meanings apply unless Congress specifically signals to the contrary. *See Field v. Mans*, 516 U.S. 59, 69 (1995); *United States v. Noland*, 517 U.S. 535, 539 (1996); *Morissette v. United States*, 342 U.S. 246, 250 (1952). "Th[is] Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Leading circuit authority confirms that the statutes' references to comity and abstention are meant to convey their familiar meanings. *See In re Pan Am. Corp.*, 950 F.2d 839, 845-46 (2d Cir. 1991) (discussing statutory language and legislative history).

Merely to describe the underpinnings and concerns of comity-based abstention is to note its importance. Abstention from the exercise of federal jurisdiction is a well-established doctrine based on "deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996); *see also Younger v. Harris*, 401 U.S. 37, 44 (1971) (similar). The doctrine is one peculiarly within the province of the Article III judiciary: "[t]his use of equitable powers is a contribution *of the courts* in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (emphasis added). Thus, abstention involves sensitive determinations of when federal courts must

relinquish their jurisdiction "because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Id.* at 501 (citation omitted).

These determinations are sensitive also because "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716. And although federal courts may abstain on grounds of comity and federalism, they may do so only in "'exceptional circumstances.'" *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). "Exceptional circumstances" do not arise as a matter of course, but, rather, traditionally have been limited to those instances in which assertion of jurisdiction may entangle federal courts in issues "'intimately involved '" with a state's "'sovereign prerogative.'" *Id.* at 717 (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)). Because of the "virtually unflagging" duty to honor federal jurisdiction, the concept of "sovereign prerogative" has been construed narrowly. *See Quackenbush*, 517 U.S. at 716-17; *Colorado River*, 424 U.S. at 816-17; *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189-91 (1959); *Meredith v. City of Winter Haven*, 320 U.S. 228, 235-36 (1943).

Legal standards governing the exercise of federal jurisdiction cannot be the subject of confusion, all the more so in an area that concerns balancing state and federal interests.[4] The federal bankruptcy interest, moreover, is particularly strong, a fact reflected in part by the breadth of its jurisdictional reach. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Even when that jurisdiction was more circumscribed, this Court asserted its certiorari

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4. Thus, for example, in *Quackenbush*, this Court adopted a narrowing construction of 28 U.S.C. § 1447(d), permitting for the review of abstention-based remand orders. *See* 517 U.S. at 713.

jurisdiction to review the propriety *vel non* of abstention in bankruptcy-related litigation. *See Mangus v. Miller*, 317 U.S. 178 (1942); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). If the abstention issues raised in bankruptcy-related litigation previously have warranted this Court's exercise of certiorari power, it follows that Congress's prohibition of *all* review of such cases merits this Court's scrutiny.

III. Decisions in the Lower Courts Bespeak Doctrinal Confusion and Discord

The constitutional plan, as reflected in Article III, envisions a hierarchical judiciary at the apex of which resides a unitary Supreme Court because only *one* body may pronounce authoritatively the law of the land. *See* The Federalist No. 22, at 182 (Alexander Hamilton); *see also Hunter's Lessee*, 14 U.S. (1 Wheat.) at 348. The dissonant rulings of the lower courts on the question of comity-based abstention from bankruptcy jurisdiction indicates the necessity for an ultimate voice to resolve the disagreements.

In many instances, the lower courts have departed from established precedent in their application of comity and federalism-based abstention and remand. Ordinarily, comity-based abstention is proper when the exercise of federal jurisdiction would compromise a state's sovereign prerogative. Comity-based abstention traditionally has been justified where the request for equitable relief raises concerns of interference with state criminal proceedings, tax collection, administrative process, or where resolution of a serious constitutional question may be obviated by affording state courts an opportunity to construe state law. *See Quackenbush*, 517 U.S. at 716-17 (summarizing this Court's abstention precedent).

The articulation and application of this doctrine by the district court below indicates just how far some courts depart from established law. The district court grounded its comity-based abstention and remand in five factors: (i) predominance of Alabama state law issues; (ii) no *per se* bankruptcy issues; (iii) potential compromise of plaintiffs' right to trial; (iv) purported recognition by SLUSA of states' "special interests"; and (v) uncertainty as to the existence of "related to" bankruptcy jurisdiction. These factors, by themselves or in the collective, do not justify abstention.

This Court already has rejected some of the foregoing factors as insufficient to justify abstention from the exercise of federal jurisdiction. It long has been held that the mere existence of difficult issues of state law is not reason enough to relinquish federal jurisdiction. *See, e.g., Meredith*, 320 U.S. at 234 (stating that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction"). If federal courts may not abstain because of the difficulty of a state law question, the multiplicity of such questions, with no showing of any particular complexity, *a fortiori* does not justify abstention. A conclusion to the contrary would bring into question the entire foundation for diversity jurisdiction. *See Propper v. Clark*, 337 U.S. 472, 490 (1949) (noting that abstaining in a diversity case based on the difficulty of a state law issue "would be to enervate diversity jurisdiction").

Other factors invoked by the district court turn abstention doctrine on its head. It is the ultimate irony, for instance, to invoke rights conferred by a federal statute as a justification for abstention. That the Securities Act permits certain pension funds to bring claims in state court does not support abstention, particularly when federal subject matter and removal jurisdiction otherwise exist. Moreover, merely filing an action under the Securities Act implicates no sovereign

prerogative of the state as that concept traditionally has been described by this Court. If anything, the existence of federal questions (here, securities law) and federal interests (here, bankruptcy) weigh heavily against the surrender of federal jurisdiction. What is more, in this instance, the district court's reliance on SLUSA adds to the irony; the provisions embodied in those amendments were designed to expand federal jurisdiction over suits brought under the Securities Act, and they did not purport otherwise to change the *status quo*. *See, e.g.*, *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 & n.4 (2d Cir. 2001).

Nor, contrary to the district court's analysis, is "uncertainty" about federal jurisdiction a reason to abstain. Abstention assumes the existence of jurisdiction and then asks whether any particular state interests compel abdication from its exercise. *See, e.g.*, *County of Allegheny*, 360 U.S. at 188-89. By focusing on its own "uncertainty" about federal jurisdiction, the district court posed the wrong question. If federal jurisdiction exists, there is an "unflagging" obligation to exercise it, unless *other* reasons, falling within recognized categories of state interests that justify abstention, compel otherwise.

In the same vein, the district court's suggestion that the absence of a *per se* bankruptcy issue also militates in favor of remand, if taken to its logical conclusion, would undermine the entire basis for "related to" bankruptcy jurisdiction. Typically, actions that are "related to" a bankruptcy are non-core and thus do not raise *per se* bankruptcy issues. But if this were a reason to abstain, it would undermine the very ability to assert "related to" bankruptcy jurisdiction. Again, reasons for abstention must relate to a state's "sovereign prerogative"; abstention cannot be justified by questioning the scope of federal bankruptcy jurisdiction.

In sum, the factors relied upon by the district court in its abstention analysis find no doctrinal support.[5] This confusion in the understanding of doctrine has resulted in conflicting rulings. The fact of conflicting decisions is a foreseeable occurrence. But when discord occurs in the same overall litigation and in cases simultaneously presenting identical questions and circumstances, considerations of fairness and institutional consistency make correction imperative. When the conflicts emanate from differing understandings of the law, this Court's role is implicated.

In the ordinary course, this Court's appellate jurisdiction enables it to resolve conflicts over the proper interpretation of federal law. Although any one particular case may not justify this Court's review, there always is the opportunity for *some* case to receive the necessary scrutiny. Here, however, unless the constitutional validity of 28 U.S.C. §§ 1334(d) and 1452(b) is examined, there will never be such a resolution. Accordingly, certiorari should be granted.

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5. The more recent abstention decisions by potential transferor courts in the Bondholder Actions display similar infirmities. *See Ill. Mun. Ret. Fund v. Citigroup, Inc.*, Civ. No. 03-465-GPM, slip. op. at 5 (S.D. Ill. Sept. 9, 2003) (abstaining and remanding on the ground that Illinois "has an interest in resolving matters concerning state pension funds" and that removal of the Securities Act action and the request for transfer with the JPML was a "clear case of forum shopping"); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, slip. op. at 6-7 (M.D. Tenn. May 9, 2003) (abstaining because of "Congress' [sic] express desire to allow state court actions and in light of the importance of protecting public retirement resources from violations of the [Securities] Act").

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

JAY B. KASNER
Counsel of Record
JOHN L. GARDINER
CYRUS AMIR-MOKRI
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Counsel for Petitioners